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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 336

E. C. JOHNSON AND LEILA B. JOHNSON, DOING BUSINESS AS THE BRAMHALL COMPANY, PETITIONERS

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 35-41) has not yet been reported. The opinion of the District Court (R. 28-30) is reported at 100 F. Supp. 491.

JURISDICTION

The judgment of the Court of Appeals was entered July 17, 1952 (R. 41). The petition for a writ

of certiorari was filed September 15, 1952. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

QUESTION PRESENTED

Whether the production of rock for the maintenance and improvement of roads and of a river channel, which are instrumentalities of interstate commerce, is "the production of goods for commerce" within the coverage of the Fair Labor Standards Act.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C., Supp. V, 201) are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several states or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related

process or occupation directly essential to the production thereof, in any State.

* * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This is an action brought in the District Court for the Western District of Missouri by the Secretary of Labor to enjoin petitioners from violating provisions of the Fair Labor Standards Act. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, but the Court of Appeals reversed, holding that the issue should not have been decided on the pleadings, and remanded the case for trial on the merits. *McComb* v. *Johnson*, 174 F. 2d 833. After trial the District Court again dismissed the complaint and the Court of Appeals reversed on the merits.

The essential facts disclosed at the trial were stipulated or admitted. Petitioners operate rock quarries and crushers at Gilliam, King City, and Regal, in the state of Missouri (R. 6-7, 28). Their employees at these three sites, as well as at defendants' office in Carrollton, Missouri, are engaged in quarrying, crushing and producing rock

and oil mat aggregate, in handling and weighing such materials, and in keeping records of such work (R. 6-7, 28). Though none of the rock was shipped out of the state (R. 26), most of it was produced for use on existing roads which carry interstate traffic (R. 9, 19-21, 27, 29) and to maintain and build dikes and revetments on the Missouri River to maintain its navigable channel as an instrumentality of interstate commerce (R. 7-8, 17-18, 24-26, 29).

About 29%, or 97,882.90 tons, of the crushed rock was produced (R. 18) "solely and only for repair, resurfacing or maintenance" of roads by the Missouri State Highway Department (R. 27). None of the crushed rock was used for "new or original construction" (R. 27). The evidence is undisputed that the existing Federal and State highways for which the rock was produced were regularly and constantly used to move goods and people from other States into Missouri, as well as to move them out of the State of Missouri (R. 9, 10-17).

Over 22% of defendants' production of crushed rock (74,597.75 tons) was "to maintain and repair dikes and revetments on the Missouri River" (R. 7), as well as to lay dikes and revetments on that river (R. 8) in order "to control the river and maintain a navigable channel" (R. 8). The district court recognized that the Missouri River is "an instrumentality of interstate commerce" (R. 29), since it was admitted that it is a "navigable river of the United States" which is "used by

barges operating in interstate commerce and in the transportation and movement of goods in interstate commerce" (R. 8).

The district court found that a "substantial portion" of the production of crushed rock by defendants' employees was "used in the repair of motoring highways" and also "substantial portions" were "for use in the building of dikes, revetments and other types of construction in the Missouri River, an instrumentality of interstate commerce" (R. 29). The district court concluded, however, since "no portion of said materials were moving in commerce, that the defendants were not producing goods for commerce, and for that reason, the employees of the defendants are not covered by the Act, and the plaintiff's complaint is dismissed" (R. 30).

The Court of Appeals reversed, expressing agreement with the decision of the Third Circuit in *Tobin* v. *Alstate Construction Co.*, 195 F. 2d 577, petition for certiorari pending, No. 296, this Term.

DISCUSSION

The issue presented by petitioner here is substantially the same as that presented in *Alstate Construction Co.* v. *Tobin,* No. 296, this Term. In the light of the considerations set forth in our memorandum in that case, we do not oppose issuance of a writ of certiorari in the present case.

Respectfully submitted,

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OCTOBER, 1952.

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